LEGAL CONSEQUENCES OF MERGERS AND ACQUISITIONS

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Abstract

The research analyses the legal effects of mergers and acquisitions from the Romanian Company Law perspective, underlining certain general principles, the procedure of annulment of such a legal transformation of companies and the protection of the employees of companies participating in the merger according to the Law no. 67/2006.

These consequences of mergers and acquisions are to be seen in the broader light of the most important purpose of this legal instrument, maximizing financial and organizational efficiencies, thus legal certainty is a desirable goal to be assumed by any merger regulation.

Keywords: *mergers, acquisitions, legal consequences of mergers, nullity.*

1. Effects of merger and acquisitions for the participating companies

1.1. General principles

Mergers and acquisitions is a legal transaction involving the change of society pact, a way of external reorganizing of the companies, to bring together assets and activities1.

With the completion of this operation, certain legal effects which accompany these types of statutory changes are produced.

The main legal consequence of such operations is determined by dissolution without liquidation of the company which ceases to exist. The other legal effects of mergers, expressly provided by article 250 paragraph (1) letter a)-c) of Law no. 31/1990, are ensuing and concern:

i) universal transmission or with universal title of the society's assets dissolved by the company or beneficiary companies;

Referring to the universal transmission of assets, it must be emphasized that the rights and obligations belonging to companies which dissolve, are transmitted in the conditions and safeguards accompanying them at the time of the operation. Although the transmission is done on a contractual basis, pursuant to the judgment adopting the merger, it has also a legal nature, by its express consecration in the provisions of article 238 paragraph (1) of Law no. 31/1990.

The fact that the assets transmission is universal and operates de jure, it determines that the transfer of rights and contractual obligations of the company dissolved in favor of the acquiring or new company formed, to be imposed automatically to contractors, without any formality. Enforceability of the principle of merger to the latter, third parties of the legal operation of reorganization is due to the publicity formalities required by law for the merger procedure.

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[1] See Ioan Schiau, Titus Prescure, *Legea Societăților comerciale nr. 31/1990. Analize și comentarii pe articole*, Ed. Hamangiu, 2007, p. 687. [*The Law of Companies no. 31/1990. Analyzes and comments on articles*], Hamangiu, 2007, p. 687.

Of course, if any trademarks, patent or other intellectual property rights, it is also necessary to fulfill the formalities laid down by the special legislation, such as those inserted in the provisions of Law no. 84/1998 on trademarks and geographical indications. In the case of immovable property, it must be followed the procedure for registration in the land register on the basis of the reorganization document concluded in authentic form, in accordance with the provisions of article 242 paragraph (3) of the Civil Code.

At the same time, the universal transfer of assets will be carried out in accordance with the distribution rules set out in the merger and acquisition project, according to article 250 paragraph (1) letter a) of Law no. 31/1990.

Universal character and universal title of transmission of assets requires, on the one hand, that all the rights belonged to the company being acquired or merging companies to be transmitted through merger, and, on the other hand, to be transmitted also the obligations of the company or companies who cease to exist.

Thus, standing to bring proceedings – locus standi – or standing to be sued in a dispute started by or against the company which ceases to exist after the merger will be made by the beneficiary company or companies. According to article 38 of the Civil Procedure Code, it is operating a transmission of the standing to pursue the proceedings.

Similarly, for disputes triggered after the date on which the merger takes effect, active or passive procedural legitimacy belongs to the beneficiary company. In this regard, the beneficiary company may sue the managers of the acquired company for damages, may initiate enforcement relying on an enforcement order to the company absorbed.

The merger can not be a reason per se for cancellation or rescission of contracts, they being imposed between the parties laid down by law, an interpretation contrary eluding itself the main purpose of the regulation of such legal-technical operations, simplification of the operation of universal transmission of assets. The rescission or termination has the nature of a penalty for non-fulfillment of a contractual obligation, or, patrimonial devolution is not a such non-execution.

Târgu Mureș Court of Appeal stated in a decision of this case[2], that the effect of the merger by absorption is the one of universal transmission of assets, the legal beneficiary acquiring both the patrimonial rights and obligations belonging to the absorbed company in the case judged. It thus concluded that the existence of an enforcement which could be successfully opposed to the absorbed company makes that the procedure about getting a new title to the absorbed company for the same claim to be uninteresting[3].

From the date from which the merger produces effects on third parties, i.e. from the date of advertising procedures, the company acquires the quality of universal cause, benefiting, inter alia, of the rights in favor of the company that is reorganizing the judgment[4].

As decided by the High Cassation and Justice - Civil Division I, in the decision no. 5141 / November 08th 2013[5], the effects of

[2] Decision no. 363/R/11.05.2006, on website: http://portal.just.ro/43/Lists/Jurisprudenta/DispForm.aspx?ID=90.

[3] The court noted that "by the universal transmission effect, the plaintiff must use the procedural means provided by law to enforce the judgment given and not to take steps to order a new enforceable title".

[4] In this regard, the Supreme Court ruled in France by commercial decision of October 21st 2008, published in *Bulletin d'information de la Cour de Cassation* (hereinafter "BICC") no. 697 of March 01st 2009. The conclusions are valid in the Romanian commercial law, due to the similarity regulations.

[5] Pronounced in case no. 13923/95/2011, published on the website www.scj.ro

the judgments in cases where the dissolved company had a party concept, are extended from the date of the merger - date of establishment of the new company, the latter acting as universal successor of the company being divided, just as it would have participated in the proceedings, the successor being obliged to comply with the judgment entered in res judicata.

In the absence of a stipulation in the contract, an absorbent company is entitled to a clause of guaranteeing a debt referred for a company being absorbed[6].

As regarding the rights of the third parties, the new company or the absorbing company is required to comply the company's obligations that are reorganizing, regardless of the agreed decision to adopt the merger[7].

Following universal transmission of the assets that accompanies the merger operation, creditors may be harmed only economically, not legally, the value of the assets that were the object of their universal pledge being able to be reduced, possibly by attaching them to a new patrimony. However, creditors have the right to object, in the conditions provided by article 243 of Law no. 31/1990.

Regarding the effect of dissolution without liquidation of the absorbed companies or companies that merge, which reach at least one of the participating entities in the merger, it causes loss of legal personality at the time the merger takes legal consequences.

Regarding contracts of companies which are abolished, as was pointed out earlier, these change in the subjective aspect, due to the intervention of legal subrogation of the absorbing company or new company, in the rights of the company/companies abolished as a result of the merger.

By Decision no. 77 / A of October 10th 2013, Târgu Mureș Court of Appeal Civil section II, of administrative and fiscal departament, cited by the High Court of Cassation and Justice, Civil Division II, in Decision no. 2327 / 19.6.2014, in case no. 3/1371/2011, it was considered that the conditions under which the merger interfered with the defendant company, the latter took only the outstanding contract with written clauses thereof, not bound to comply or continue various commercial habits established by the terminated company after the merger[8].

It should be noted that the aforementioned subrogation occurs without further formalities than those provided for the validity and enforceability of the merger.

However, the concession contracts, that are intuitu personae, can not be transferred without the consent of the grantor, given the prohibition in article 28 paragraph (6) of Law no. 219/1998.

Furthermore, employment contracts concluded by the absorbed company or the abolished one, as a result of the merger shall be forwarded by law to the beneficiary company.

Following the universal transmission, augmentation of capital occurs regarding the absorbent company with the regime of a contribution in kind.

ii) award of shares or of shares in the company or the beneficiary companies to the associates of the company which is dissolved;

The legislator regulates the situation of mutual holdings of securities between the participating companies in the merger.

[6] *Cour de Cassation*, Chambre Commerciale, commercial decision of July 10th 2007, BICC no. 671 of November 15th 2007.

[7] See the decision of the French Supreme Court, Chambre Commerciale, April 7th 2010, application no. 09-65899, published on the website Légifrance at http://www.legifrance.gouv.fr/initRechJuriJudi.do.

[8] Published on the internet at: http://lege5.ro/en/Gratuit/gqydmobtgm/decizia-nr-2327-2014-privind-obliga-ia-de-a-face.

According to article 250 paragraph (2) of the Law, the shares in the absorbent company can be exchanged for shares issued by the company being absorbed and are held either by the absorbent company itself or through a person acting in its own behalf but on behalf of the company or by the company being absorbed itself or through a person acting in its own behalf but on the company behalf.

iii) the absorbed company ceases to exist since its removal from the commercial register.

This extinctive effect is, in fact, an essential feature of the merger, with repercussions on the validity of the operation. Thus, there are not part of the reorganization of merger type the disposals and exchanges of securities, shares, in which case their issuing company continues to protect its autonomy and its legal status.

Dissolution caused by merger is not followed by liquidation, it becomes useless by the transmission with universal assets character of the company or companies being absorbed / that merge. Therefore, the principle of survival of legal personality for liquidation is not applicable to this method of reorganization.

1.2. Date on which the merger is effective

Law number 31/1990 establishes different dates to produce merger effects, depending on the specifics of each operation.

According to article 249 letter a) of the Act, the effects of the merger are occurring after the date of registration in the trade register of the new company or the last of them.

In case of merger by absorption, the general rule provided for by article 249 letter b) of the Act shows that the effects are produced from the registration decision of the last general meeting which approved the operation.

The legislator established, as an exception to the general principle previously pointed out, the situation in which the parties agree that the operation takes effect on a specific date, stating that it can not be after the conclusion of the current financial year of the absorbent company or beneficiary companies or earlier conclusion of the last financial year of the company or companies that transfer their assets.

1.3. Effects of the merger towards third parties

As a general rule, contractual rights and obligations belonging to the company which will be forwarded to dissolve are transmitted to the absorbent company or the newly created company. The latter is part of a contract, without other contractors to object, as a result of the universal transmission of the assets.

However, some contracts do not follow this regime. It is about the conventions intuitu personae, at the conclusion of which the consideration of the contractor is determined. Because these contracts are submitted to new company or absorbent company, it is required the prior consent of the contracting party[9].

1.4. Protection of employees of companies participating in the merger

According to article 243 paragraph (9) of Law no. 31/1990, the opposition institution to the merger recognized to social creditors and governed by the provisions of

[9] See in this respect, on the character *intuit personae* of an exclusive concession contract or of a commercial agency contract, Cour d'appel de Paris, November 2nd 1982, *Bulletin repide de droit des affaires (Éditions Francis Lefebvre*) February 15th 1983, p. 12; and the Cour de cassation, chambre commerciale, October 29th 2002, Bulletin Joly Societies, 2003, p. 192.

article 243 paragraph (1) - (8) of the same law does not apply to wage claims arising from the individual employment contracts or applicable collective agreements, which satisfy the conditions of paragraph (1), whose protection is made according to the Law no. 67/2006 on the protection of employees' rights in case of transfer of the enterprise, unit or parts thereof, and according to other applicable laws.

For the purposes of the constitutionality of the above provisions was ruled the Constitutional Court Decision no. 404/2012 relating to dismiss the objection of unconstitutionality of article I point 4 of Government Emergency Ordinance no. 90/2010 amending and supplementing Law no. 31/1990[10].

The court was notified of the objection of unconstitutionality of article I point 4 of Government Emergency Ordinance no. 90/2010 amending and supplementing Law no. 31/1990, exception made by a union in a case covering the outcome of the opposition against a merger ruling thereon.

In motivating the exception of unconstitutionality, its author argued that the legal provisions criticized affect free access to justice for employees who see themselves deprived of the appeal of the opposition to the merger / division given that they are holders of firm, liquid debts, but not due. According to the author of the objection, removal of employees from among those persons who can raise objections was made on the basis of discriminatory criteria.

The Court held that protection of employees is carried out according to the provisions of Law no. 67/2006 on the protection of employees' rights in case of transfer of the enterprise, unit or parts thereof. The provisions of article 5 of Law no. 67/2006 provide imperatively that the rights and obligations of the assignor arising from individual labor contracts and applicable collective labor contract existing at the time of the transfer; will be transferred entirely to the transferee, it having also the obligation to comply with the applicable collective labor contract. Thus, the new legal entity is obliged to provide all rights to salary and other that employees had prior to the time of the merger.

Thus, the Law 67/2006 on the protection of employees' rights in case of transfer of the enterprise, unit or parts thereof has transposed into national law Directive 2001/23 / EC[11].

Prior to adoption of this particular normative framework, were introduced Articles 173 and 174 of the Labor Code - Law no. 53/2003, norms that are the common law on the matter. These provide that employees enjoy protection of their rights where a transfer of enterprise, unit or parts thereof, to another employer, by law, that the rights and obligations of the transferor arising from a contract or relationship employment existing on the transfer date will be entirely transferred to the transferee and the transfer of the enterprise, unit or parts thereof can not constitute grounds for collective or individual dismissal of employees by the transferor or the transferee. At the same time, it is recognized a right to earlier information and consultation of the transfer, of the trade union or, where applicable, of the employees representatives on the implications of legal, economic and social consequences for employees resulting from the transfer of ownership and the related

[10] Published on the internet at https://www.ccr.ro/ccrSearch/MainSearch/SearchForm.aspx

[11] Directive 2001/23 / EC of March 12th 2001 on the approximation of laws of the Member States relating to the safeguarding of employees in the event of transfers of enterprises, units or parts of enterprises or units, published in Official Journal L 082/16, 05 /volume 06, p. 20.

obligation borne by the transferor and transferee.

Law no. 67/2006 transposing the Council Directive 2001/23 / EC on the approximation of the laws of the Member States relating to the safeguarding of employees in the event of transfers of enterprises, units or parts of enterprises or units[12].

Regulating a detailed procedure, special rules - Law no. 67 / 2006 – define at article 4 letter d) the notion of transfer, as the passage of property owned by the transferor to the transferee of an enterprise, unit or parts thereof, aimed at continuing the principal or secondary activity, whether intended or not making a profit.

Thus, article 5 of Law no. 67/2006 provides that the transferor's rights and obligations arising from individual labor contracts and the applicable collective contract, existing on the transfer date, will be fully transferred to the transferee.

Prior to the transfer, the transferor has to notify the assignee of all rights and obligations to be transferred to it.

Failure to notify will not affect the transfer of these rights and obligations to the transferee and the rights of employees. [Article 6 of the Act]

The most important provision of the law is related to the fact that transfer of the business, unit or parts thereof can not constitute grounds for collective or individual employees' dismissal by the transferor or the transferee, provided by article 7 of Law no. 67/2006.

In addition, if the transfer involves a substantial change in working conditions to the detriment of the employee, the employer is responsible for termination of the individual employment contract. [Article 8]

The transferee has the obligation to observe the collective agreement applicable to the transfer date until the date of termination or expiry. By agreement between the transferor and representatives of employees, collective agreement clauses valid at the time of transfer can be renegotiated, but not earlier than one year from the date of transfer.

Where, following the transfer, the enterprise, unit or parts thereof do not preserve its autonomy and the collective agreement applicable to the transferee is more favorable to employees transferred will apply more favorable collective agreement. [Article 9]

Where, following the transfer, the enterprise, unit or part thereof retains its autonomy, the representatives of the employees affected by the transfer maintain their status, powers and function of whether the conditions for representation are complied under the law. If legal representation conditions are not met, the transferred employees choose their representatives by law.

If the transfer of the enterprise, unit or parts thereof does not preserve its autonomy, the transferred employees will be represented by their express agreement by representatives of the employees of the transferee's company, until the establishment or inauguration of new representatives, under the law. [Article 10]

According to article 11 if the transferor or transferee envisages measures on its own employees, will consult with the employees' representatives in order to reach agreement with at least 30 days before the date of transfer.

Article 12 paragraph (1) of the Act provides that the transferor and the transferee shall inform in writing the employees' representatives themselves or, if they are not constituted or appointed on their employees, with at least 30 days before the date of transfer, on the date of transfer or proposed date of transfer, the reasons for the

[12] Published in the Official Journal L 82 of March 22nd 2001

transfer, the legal, economic and social implications of the transfer for employees, the measures envisaged in relation to the employees and the conditions of work and employment.

Paragraph (2) of the same legal text, states that the information obligation under paragraph (1), shall apply regardless of whether the decisions resulted from the transfer are taken by the transferee or by an enterprise exercising control over it.

2. Nullity of the merger of companies on the commercial activity

2.1. Legal nature of the merger nullity

Merger nullity is both a cause of inefficiency and a sanction lacking the transaction of the contrary effects of legal rules enacted to achieve the reorganization process to companies / company involved. Thus, it intervenes only when it conflicts legal rules governing the conditions of validity, of background or shape of the operation.

From the legal regulation of the merger nullity, namely the provisions of article 251 paragraph (1) of Law no. 31/1991, it is deduced the legal nature of the nullity of the operation said. Thus, the legal text expressly provides that the nullity of a merger to be declared only by court order, expressly excluding the possibility of amicable nullity in this matter.

Reported to the nature of the interest protected by the legal provisions violated in pursuit of completing the merger, its nullity can be absolute or relative. The law itself refers to the provisions of article 251 paragraph (3), to the absolute or relative grounds for nullity, namely the nullification proceedings and of declaration of the merger nullity.

The same text establishes the prescriptive nature of the nullity, so it can not be relied upon expiry of 6 months from the date on which the merger or division became effective.

It is noted, however, that the premises for nullity or annulment of operation are strictly provided by the law and the sanction cannot be extended to other legal situations.

2.2. The grounds of the merger nullity

According to article 251, paragraph (2) of the Act, the two grounds of nullity, strictly established, are: the lack of judicial control in accordance with legal regulations and absolute or relative nullity of one of the general meeting which voted the merger project.

In this regard, the commercial sentence no. 7702 of June 24th 2010 in case no. 50861/3/2009 of Bucharest Tribunal, irrevocable by decision no. 3601/2011 of the High Court of Cassation and Justice, Civil Division II[13], the court held that there can be retained grounds for nullity of the merger decision of general meeting on the conduct of the merger in two stages, "because on the date of preparation and publication of the merger project Law no. 31/1990 was no longer compulsory to conduct two-step merger, article 239 of the Act does not contain no penalty for the lack of judgment in principle on the merger or division, and the merger nullity can be declared only in accordance with article 251 of the same law.

Thus, the reason for nullity of the judgment of the general meeting alleging infringement of the provisions of article 134 of Law no. 31/1990 was rejected by the court, given that it is not found in the

[13] *In extenso,* on the Internet at: http://www.scj.ro/1093/Detalii-jurisprudenta?customQuery%5B0%5D.Key=id&customQuery%5B0%5D.Value=78160.

grounds for nullity mentioned in article 251 of mentioned regulation.

A) Lack of judicial / administrative control

Regarding the first question of nullity, the text provides that the legal nullity may intervene in the merger which was not subject to judicial control in accordance with article 37 of the same law.

Thus, according to article 37, paragraph (1) of the Act, the control of the legality of acts or facts which, by law, are registered in the trade register, is exercised by justice by a delegated judge.

It should be noted that through article 1 of Government Emergency Ordinance no. 116/2009 for establishing measures on trade registration activity[14], notwithstanding the Law no. 31/1990, it was provided that has jurisdiction to hear applications for registration in the trade register and, where appropriate, other applications under the jurisdiction of the judge delegated to the regulation of trade registration conducted by commercial registrars, for the director of the trade register office attached to the court and / or the person or persons designated by the Director General of the National Office of the Trade Register.

This legislative amendment was based on the desire to remedy with celerity the blockage existing at the trade registry offices.

Consequently, the control of legality performed to record changes of the articles of association with the trade register, just like any other registration, is carried out by the Director of the Trade Register attached to the tribunal and / or the person or persons designated by the Director General of the National Office of the Trade Register and not by the delegated judge.

Specifically, after drafting the merger project and signing it by representatives of participating companies, it is submitted to the Trade Register Office where is registered each company, together with a statement of the company which ceases to exist after the merger or division on how was decided to extinguish its liabilities, and a statement regarding the manner of publication of the merger project or division (article 242, paragraph (1) of Law no. 31/1990)

The law provides that the merger or division, will be targeted by the delegated judge, for publication in the Official Gazette of Romania, Part IV, at the expense of parties, in whole or in excerpt, according to the judge's delegation or demand of the parties, with at least 30 days prior to the dates of extraordinary general meetings in which are to decide, pursuant to article 113 letter h) on the merger. (Article 242 paragraph (2) of Law no. 31/1990)

To simplify the procedures and to reduce the administrative costs, the legislator has given companies the possibility, if they have their own web page, to be able to replace the publication in the Official Gazette of Romania, Part IV, provided in the paragraph (2) with the publication made through its own website, for a continuous period of at least one month before the extraordinary general meeting which is to decide on the merger / division, period ending not earlier than the end of that general final meeting. (Article 242 paragraph (2^1) of Law no. 31/1990)

Therefore, the lack of performance of a judicial / administrative control targeting the merger project for publication in the Official Gazette or on its own web page, is ground of nullity of the merger operation as a whole.

Clearly, because is the question itself is the nullity operation, it is necessary to invoke such irregularity to be achieved the completion of the merger process, of course,

[14] Approved by Law no. 84/2010.

within the period prescribed in Article 251 paragraph (3) of Law no. 31/1990.

B) The situation in which the judgment of one of the general meeting which voted the merger project is void or voidable

Without distinction on grounds of public policy or private character of the rule disregarded the adoption of the ruling of the General Assembly which voted the merger project, such an irregularity per se justifies a declaration of nullity in the merger process.

It should be noted that if earlier completion of the process fusion, absolute nullity or, where applicable, relative to this legal act drew the imprescriptible character or prescriptible of the action in finding the nullity or annulment of the judgment, from the date on which the merger becomes effective regardless of the nature of the interest protected by the infringed rule, the invocation of the merger nullity for this reason is prescriptible within 6 months provided for in article 251 paragraph (3) of Law no. 31/1990[15].

2.3. The procedure of nullity declaration

As noted above, the nullity of the merger has a judicial character and the right of action is prescribed under article 251, paragraph (3) of Law no. 31/1990, within 6 months from the date on which the merger or division has become effective pursuant to article 249, or if the situation has been rectified.

The date on which commences the prescription term - dies a quo - is, in case of the formation of one or more new companies, specifically in the case of the merger, from the date of registration in the trade register of the new company or the last of them, and in case of merger by absorption, from the recording date of the last judgment of the general meeting which approved the operation, except that, by agreement, it is stipulated that the operation will take effect on another date. In the latter situation, the conventional chosen date may not be later to the end of the current financial year of the absorbent company or beneficiary companies, nor the later to the end of the last financial year of the company or companies that transfer their assets.

During this time is essentially legal, and the calculation of this period is done according to the general rules contained in the provisions of article 2552 of the Civil Code. Thus, it shall expire on the corresponding day of the last month, and if the last month has no corresponding day to the one in which the term began to flow, the term shall expire on the last day of this month.

Thus, by Decision no. 178 of April 10th 2009 pronounced in case no. 2718/87/2008, Bucharest Court of Appeals - Commercial Section VI[16], it was noted that under article 251, paragraph 3 of Law no. 31/1990, the cancellation procedures and declaration of merger nullity or division may not be initiated after the expiration of six months from the date on which the merger or division became effective under article 249, or if the situation has been rectified. Also, according to article 249, letter b of the Law no. 31/1990, republished, the merger takes effect from the date of registration of the last general ruling that approved the operation.

[15] For details, see Cristian Gheorghe, *Drept comercial român*, Ed. C.H. Beck, București, 2013, p. 518-520. [*Romanian Commercial Law*], Ed. C.H. Beck, Bucharest, 2013, p. 518 – 520. The author argues that the action for annulment of the general meeting judgment which approved the merger project, brought after the consolidation operation, "is absorbed by the action in the operation nullity, existing only inside and with its justification" (*opus citatum, p. 520*).

[16] Available on the Internet, at the address: http://portal.just.ro/2/Lists/Jurisprudenta/DispForm.aspx?ID=427

The Court found that the date specified in article 249 letter b) of the Act was to September 26th 2007, when it held general meetings of both companies, so the company that is being absorbed and the absorbent company, meetings that approved the merger, noting that there were no oppositions to the merger project.

Given that from this date passed more than six months, the request of declaration of nullity of the merger by D.G.F.P.J.T. was recorded before Teleorman Court on October 20th 2008, the Court accepted this lateness exception formulation request and rejected the request as being out of time.

Being a period of extinctive prescription, it is subject to the institution of suspension[17], interruption[18] and restoring the prescription period[19], given that the law provides otherwise. Of course, common law causes of suspension, interruption and restoration in term provided for by article 2532, article 2537, respectively article 2522 of the Civil Code have not fully implemented the mergers situation, given the specific of this operation and the topics that may invoke the nullity of this operation.

An action for annulment / nullity may be exercised by the associates of the companies participating in the merger, stating that, on the invocation of the relative nullity of decisions of the general meetings, must take into account the provisions of article 132, paragraph (2) of Law no. 31/1990. More specifically, they exclusively act as shareholders who have not taken part in the general meeting or voted against and asked to insert it in the minutes of the meeting.

It should also be noted that, from the regime of absolute nullity, any person may request the its declaration judicially, but must be proven he essential condition for setting in motion the civil action, namely the interest, practically benefit pursued by the plaintiff, who must be legitimate, vested and present, personal and determined according to article 32, paragraph (1) d) of the New Code of Civil Procedure.

In this regard, it was ruled also the High Court of Cassation and Justice, Civil Division II, by decision no. 2580 / June 27th 2013, in case no. 1508/1259/2011*[20]. Thus, in line with those adopted by the appeal court, it was noted that "the plaintiff has locus standi because it relied on a ground of absolute nullity, which can be invoked by third parties to the merger agreement," but it did not justified "a practical interest in invoking this absolute nullity".

The court vested with such action shall grant the companies involved in the merger process a deadline for rectification, in cases where the nullity is likely to be remedied. [Article 251, paragraph (4)]

Of course, the assessment on the possibility of rectification belongs to the court.

The provisions of article 251, paragraph (3) from the last thesis of the law

[17] Suspension of the prescription term is "that change of the course of the prescription that lies in stopping rightfully the flow of the prescription term during limiting situations provided by law that put it in the impossibility to act on the holder of the right to act". See, în acest sens, Gabriel Boroi, Liviu Stănciulescu, *Instituții de drept civil în reglementarea noului Cod Civil*, editura Hamangiu, București, 2012, p. 310 și următoarele. [*Institution of civil law in the regulation of the new Civil Code*], editura Hamangiu, Bucharest, 2012, p.310 și următoarele.

[18] Interruption of prescription term is to change its course consisting of removal of the prescription period elapsed prior occurrence of an interruption and the start of another prescription. *Ibidem*, p. 314 et seq.

[19] Restoring the term is a benefit granted by law to the right holder to action which, for good reasons, could not trigger the action within the prescription period, so that the body of jurisdiction is entitled to deal in substance the complaint in court, although it was brought after the expiry of the prescription period. *Ibidem*, p. 319-322.

[20] Published on the Internet, at the address, http://www.scj.ro/1093/Detalii-jurisprudenta?customQuery%5B0%5D.Key=id&customQuery%5B0%5D.Value=113441.

take into account the possibility that the companies involved to rectify the irregularity prior to referral to the court. According to the law, cancellation procedures and merger or division nullity declaration may not be initiated if the situation has been rectified.

In the legal doctrine[21], it was stated that legal provisions do not refer to a real inadmissibility of the action, the court being forced to determine whether the grounds for nullity and fixing them until the notification date of the court.

We agree with this view, arguing that, indeed, the law does not stipulate a plea of inadmissibility, the analysis of existence at the time of the action, a plea of nullity of the operation is done either in terms of the merits of the action, either the existence of the interest demanded by law to promote the action based on concrete facts before it.

Regarding the mandatory procedure prescribed by law, must be evoked the conclusions of the High Court of Cassation and Justice, in the Commercial Decision no. 153 of January 18th 2011[22], which showed that in the procedural framework governed by the provisions of article 364 of the Civil Procedure Code, criticisms must concern the arbitration decision and the judgment of the court in an action for annulment and not for reasons which may be invoked in accordance with the rules established by another law.

Thus, continued High Court's reasoning, the exception of nullity judgment of the extraordinary general meeting of shareholders and of the merger company can be analyzed only after the procedural rules laid down by the mandatory provisions contained in article 132, article 250 and article 251 of Law no. 31/1990 and can not be valued on incidental way.

As required by article 251, paragraph (5) of the law, "[the final declaration of nullity decision of a merger or division will be forwarded ex officio by the court to the registry offices at the headquarters of trade companies involved in the merger or division concerned"].

2.4. Effects of merger nullity

The legal consequences of the sanction of nullity of a civil legal act are governed, traditionally, by the three principles of the common law of such sanctions: retroactive effects of nullity, reinstatement in the previous situation – restitutio in integrum, the cancellation of both the operation and subsequent legal acts - resolute iure dantis, resolvitur ius accipientis.

In the matter of merger nullity, these principles known, however, justified limitations on the specific operation, the need to protect the interests of third parties in good faith, and for ensuring legal certainty.

Thus, first, article 251, paragraph (6) of Law no. 31/1990 provides that "[the final decision of declaration of nullity of a merger [...] shall not affect the validity of obligations incurred by itself in the benefit of the absorbent or beneficiary company engaged after the merger or division became effective under article 249, and before the ruling of nullity to be published."

As a result of the principle of restoring the previous situation, the company or companies that have ceased to exist by merger, regain legal status, are canceled the legal effects of removal from the trade register and are excluded amendments of articles of association of the benefiting companies.

However, according to article 251, paragraph (7) of the Act, if the nullity

[21] Cristian Gheorge, *opus citatum*, p. 522.

[22] Available on the Internet, at the address: http://www.scj.ro/1093/Detalii-jurisprudenta?CustomQuery%5B0%5D.Key=id&customQuery%5B0%5D.Value=82969.

declaration of a merger, the companies involved in the merger shall be jointly liable for the obligations of the absorbent company after the merger or division became effective, pursuant to article 249, and before the ruling of nullity to be published.

Conclusions

This paper aims to examine the effects of the merger on the companies' business, and the nullity of such an operation from a dual perspective, theoretical and practical.

Although Romanian law covers a broad regulatory issue mentioned, the regulations are imperfect.

Thus, as a *de lege ferenda* proposal, we believe that it would be necessary to clarify and define the causes of suspension, interruption and restoration of the time limit on the period of extinctive prescription provided in article 251, paragraph (3) of Law no. 31/1990. Common law cases are not adapted to the operation, nor reported to topics that can engage in a procedure of annulment or declaration of nullity of the merger. However, keeping in view the wishes of legal certainty, predictability and creating an attractive tool for companies that want to reorganize, those cases that determine, ultimately, the timing of the procedure referring to the merger should be restrictively provided by law.

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